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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from BIAC

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- BIAC --

1. Introduction

1. BIAC appreciates the opportunity to make this written contribution to the debate on improving international co-operation in cartel investigations and looks forward to participating in the discussions at the OECD Global Forum on Competition.

2. Background

2. BIAC fully supports vigorous and effective enforcement to eradicate hard core cartels. Indeed, because businesses are often the direct customers, they are damaged as much as consumers and the economy as a whole by hard core cartel behaviour. Where a hard core cartel is international in scope, effective enforcement can be enhanced by co-operation between investigating authorities. BIAC's contributions are made in an attempt to assist in furthering such enforcement, recognising, of course, the need for appropriate protection of the rights of defence and of the confidential information of any person - business or individual - accused of such serious infringements.

3. The OECD Recommendation of the Council concerning Effective Action Against Hard Core Cartels of 1998 ("the 1998 Recommendation") defines a hard core cartel as an anticompetitive agreement or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. Excluded from the definition are agreements or arrangements authorised under or excluded from the coverage of the national law or which are related to the lawful realisation of cost-reducing or output-enhancing efficiencies¹. BIAC considers that to the extent conduct falls clearly into the hardcore category, this comprehensive definition remains valid to identify these serious violations. We would underline the need to maintain a clear distinction between such behaviour and the broader range of activities which may be subject to competition laws but which should not be confused with or equated to hard core cartel behaviour. As more and more countries adopt competition laws and authorities seek to apply those laws to an ever broader range of perceived problematic behaviour, the term "cartel" is sometimes used overly-broadly. The need for a clear, consistent approach to identifying hard core cartel behaviour appropriately remains of crucial importance. Efforts at convergence in developing a consistent definition of hard-core cartel activity, both in concept and in enforcement efforts, are among the most important forms of co-operation in which authorities can engage.

4. The implementation of the 1998 Recommendation has been the subject of OECD Reports, most recently in 2005², which BIAC has noted with interest. BIAC also participated in the discussions leading to the OECD's Best Practices for the Formal Exchange of Information between Competition Authorities in

¹ Para A. 2.a).

² OECD Reports. Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation 2005.

Hard Core Cartel Investigations 2005 (“the 2005 OECD Best Practices”) and to their recognition of the need for and formulation of the safeguards to protect commercially sensitive and other confidential information.³ Formal “mutual legal assistance” and similar international co-operation agreements can provide transparency and add confidence that cooperative efforts between enforcement authorities are to be conducted for defined purposes, according to an established set of protocols and respecting such safeguards.⁴

5. Recent developments in the technological and business background underline the continuing need for and importance of safeguards to protect commercially sensitive and other confidential information. There is no basis for eroding them. For example, among such recent developments we would note the increased technological sophistication of investigation techniques under which some enforcement authorities may now in certain circumstances duplicate the entire contents of the memory of computers or servers. This means that ever greater quantities of confidential information, of varying relevance or no relevance at all to the investigation but including the most recent and sensitive legitimate commercial materials may be held by enforcement authorities. The maintenance of the highest levels of protection and safeguards for such information is crucial. This is especially true as cartel enforcement proliferates in jurisdictions where there is no clear line of demarcation between – and at times a unity of – governmental and commercial interest.⁵ Developments in business economics and the speed of technical change mean that information represents an increasingly vital and valuable portion of the assets of businesses in many sectors, again underlining the need for high levels of protection and safeguards for confidential business information. At the same time data systems are increasingly vulnerable to hacking, espionage and other illegal practices to extract data and so companies are increasingly dependent on adequate safeguards to protect confidential information.

3. Business’ Contribution to International Co-Operation

6. Over and above responding to investigations, a key aspect of business' contribution to, and co-operation with, cartel enforcement takes place within the context of leniency programmes. This section of BIAC’s submission will focus on ways in which leniency programmes could be better aligned and coordinated so as to provide an optimum level of incentive for businesses to report illegal cartels, maximising the investigation and prosecution efforts which follow.

7. As more authorities around the world recognise the value of leniency regimes and adopt their own programmes, there is currently some concern that divergences, and even outright contradictions, between these programmes create problems which make it more difficult to rely on leniency programmes effectively in some international cases and even more difficult to agree waivers for the exchange of leniency information. Whilst business welcomes the spread of leniency programmes, it would be unfortunate if problems in the way the various programmes function together were to lead to reduced use of them in international cases.

³ BIAC also proposed additional safeguards at that time with respect to confidentiality, but understands that the consideration of such additional safeguards are beyond the scope of the present forum.

⁴ The 2005 OECD Report notes that the number of international co-operation agreements continues to grow significantly – p. 37. The United States alone has entered into bilateral cooperation agreements with 11 separate jurisdictions. See, <http://www.justice.gov/atr/public/international/int-arrangements.html>.

⁵ See also comments by BIAC in relation to the work on SOEs and the need for a level playing field in competition law.

8. Areas in which inconsistencies between leniency programmes may currently cause difficulties include:

- How the potential applicant should establish the facts. Contradictory requirements to interview employees to provide the most complete admission in some jurisdictions, but to refrain from interviewing key witnesses in others, may reduce the chance of applying successfully in both jurisdictions, so reducing the incentive to apply in either jurisdiction and ultimately reducing the likelihood of the cartel being discovered and prosecuted at all.
- Inconsistent approaches to marker policies. Confessions would be encouraged if marker policies were aligned, including as to availability, information requirements, timing and the scope of markers granted. The process to perfect markers on a timely basis in multiple jurisdictions can also be complex and a flexible approach, recognizing the time and resources needed⁶ would encourage use of leniency policies.

BIAC would respectfully suggest that the OECD consider embarking upon an initiative to develop a recommendation regarding the availability and implementation of marker policies, with a common set of principles and practices. Such a recommendation could most usefully include the availability of an option for a company applying for a marker in one OECD jurisdiction to opt for that application to qualify in other OECD jurisdictions concerned. A “one-stop shop” for the application for necessary markers would represent a most important step forward in encouraging business co-operation with international hard core cartel enforcement through recourse to leniency programmes.

- The extent of the jurisdictional nexus required to trigger an investigation and hence the lack of clarity as to which jurisdictions an applicant needs to address without either "missing" jurisdictions where a less worthy applicant may then secure priority or wasting resources - its own and those of the authorities concerned - by making unnecessary applications.
- Appropriate safeguards in all jurisdictions concerned regarding limited use and disclosure of leniency information (including a clear commitment to oppose its disclosure for use in private litigation).⁷
- Tensions between obligations by some jurisdictions (notably the EU) that the amnesty applicant immediately discontinue communications with other cartelists, while other authorities (notably the US) simultaneously may require the applicant to engage in “consensual monitoring” by remaining in contact with those same cartelists.
- The prohibition by some jurisdictions (notably the EU) against the amnesty applicant disclosing the fact of its amnesty position during the investigation while other jurisdictions (notably the US) require the amnesty applicant to reveal themselves and cooperate with civil plaintiffs in order to reduce their liability exposure.
- Timing and scope of requests for applicants to provide information exchange waivers. Waivers to permit disclosure of confidential information should never be mandatory but improved consistency would promote willingness by leniency applicants to grant waivers permitting disclosure of information to other authorities under appropriate safeguards. In this respect,

⁶ For example to deal with issues of differential exposure of individuals, the volume of records to be reviewed and the need for translations.

⁷ At present many authorities are playing an active role to assist in protection of leniency documents from disclosure in private disputes but the courts, while frequently helpful, have not invariably granted maximum protection to them. BIAC would encourage the promotion of legislative solutions where necessary to protect leniency documents and hence leniency programmes.

business is aware of the OECD's 2011 Guidelines to Multinational Enterprises which provide that such enterprises should "co-operate with investigating competition authorities by, among other things and subject to applicable law and appropriate safeguards.....considering the use of available instruments, such as waivers of confidentiality where appropriate, to promote effective and efficient co-operation among investigating authorities⁸. To enhance such co-operation it is vital, as to timing, that waivers should not be requested until the availability and scope of leniency has been established in all of the jurisdictions concerned (which may mean waiting to make waiver requests or providing earlier leniency rulings). As to scope, waiver requests should be limited to the scope common to the leniency rulings concerned and should not include legally privileged information.

- Recognition of legally privileged materials. BIAC has consistently emphasized the need for greater international convergence in establishing a clear international standard for the comprehensive protection of legal advice. It will remain impossible to achieve the highest possible level of co-operation in respect of international leniency cases, or indeed international cartel cases more generally, without recognition by all authorities concerned that businesses need to be able to seek advice in confidence from lawyers around the world to examine their conduct in the light of all applicable competition laws and to prepare an appropriate strategy for resolving any problems which may have arisen⁹. National laws which limit legal privilege to locally qualified attorneys or which exclude in-house counsel from its protection continue to undermine the scope of voluntary co-operation which may reasonably be offered in many international cases¹⁰.
- Predictability as to the recognition of the contribution of second and subsequent applicants. In international cases there may often be circumstances where even a business which is most anxious to co-operate and resolve a competition problem finds that it cannot be first to apply for leniency in every jurisdiction involved. Greater predictability as to the position of subsequent applicants would enhance the likelihood of voluntary co-operation from such potential applicants.
- Predictability as to the calculation and level of sanctions from which leniency reductions will be made. A more consistent international approach could avoid unnecessarily duplicative penalties¹¹

9. As the 2005 Report¹² recognises international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels and confidentiality waivers in cases of simultaneous leniency applications have created more opportunities for multi-jurisdictional co-operation¹³. Removing the inconsistencies between leniency programmes which impede their smooth interaction in international cases, including those identified above, would help to ensure that the opportunities in the

⁸ OECD (2011) OECD Guidelines for Multinational Enterprises, Part 1, Recommendations, Section X para 3 p 57.

⁹ Greater and more uniform recognition of the value of compliance efforts would also increase the incentive for companies to implement state of the art international compliance programmes.

¹⁰ While the discussion of legal privilege goes beyond the scope of the present Global Forum and so is not further discussed in this submission, BIAC would once again underline the importance of legal privilege and of protection of it as a topic for international convergence efforts.

¹¹ Currently duplication can arise from overly-broad definitions of affected sales or commerce, whether geographically overlapping or by including sales of finished products incorporating the products affected by the cartel.

¹² See footnote 2 above.

¹³ Report p30.

future are maximized to encourage businesses to rely on those programmes and provide the information waivers which facilitate agency co-operation.

4. Scope for Increased International Co-Operation : Conclusions

10. Beyond the scope of agreed waivers, particularly in leniency cases as discussed in this submission, BIAC supports international co-operation agreements including appropriate safeguards¹⁴ for confidential information and would, in conclusion, underline how crucial such safeguards are, not least in light of the technological and business developments and the opportunity for enhanced voluntary co-operation under leniency programmes. BIAC would be pleased to discuss further and to contribute to an initiative to develop an OECD recommendation regarding the availability on a “one-stop shop” basis and implementation of marker policies under such leniency programmes.

¹⁴ Which meet or exceed the 2005 OECD Best Practices standards.